Supreme Court, U. S.
FILED
SEP 1 1976
MICHAEL RODAK, JR., CLERK

Nos. 75-1528 and 75-1529

In the Supreme Court of the United States

OCTOBER TERM, 1976

HOWARD BAPTISTA, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN HATHAWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (No. 75-1528 Pet. App. 1-28; No. 75-1529 Pet. App. D) is reported at 534 F. 2d 386.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1976. The petition for a writ of certiorari in No. 75-1528 was filed on April 22, 1976, and the petition in No. 75-1529 was filed on April 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner Hathaway's conspiracy convictions.

2. Whether the trial court erred in instructing the jury that a violation of the Travel Act, 18 U.S.C. 1952, could be predicated in part upon proof of voluntary bribery payments to a public official, where other counts of the indictment alleged that the payments were the product of "extortion" under the Hobbs Act, 18 U.S.C. 1951.

3. Whether the trial court erred in instructing the jury regarding the interstate travel requirement of the Travel Act.

4. Whether petitioners were denied due process by the trial court's grant of immunity to four prosecution witnesses.

5. Whether petitioners were denied due process by the government's alleged failure to comply fully with a pretrial discovery order.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on two counts of obstructing interstate commerce through extortion, in violation of the Hobbs Act, 18 U.S.C. 1951 (Counts III and V), on one count of conspiring to commit that substantive offense, in violation of the same statute (Count I), on two counts of causing others to travel and utilize facilities in interstate commerce to facilitate unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952 (Counts IV and VI), and on one count of having conspired to violate the Travel Act, in violation of 18 U.S.C. 371 (Count II). Petitioner Baptista was fined $1,000 on each of the six counts and was sentenced to two years' imprisonment, with all but six months of that term

suspended in favor of eighteen months' probation. Petitioner Hathaway was fined $2,000 on each of the six counts and was sentenced to two years' imprisonment, with all but four months of that term suspended in favor of twenty months' probation. The court of appeals affirmed in a comprehensive opinion (No. 75-1528 Pet. App. 1-28; No. 75-1529 Pet. App. D).

In June 1971, petitioner Baptista, the executive director of the New Bedford Redevelopment Authority ("Authority"), met with Thomas Graham, the chairman of the board of Meridian Engineering, Inc. ("Meridian"), to discuss the possible award to Meridian of a contract with the Authority for a $230,000 construction project (I Tr. 34-35, 43, 51). At this meeting, Baptista arranged to insure that Meridian would receive the contract in exchange for a kickback to himself of $25,000 (I Tr. 50-54). Graham agreed to the payment because he believed that the contract would not be awarded to Meridian unless the payment was made (V Tr. 95).

The payment to Baptista was disguised through the use of fraudulent invoices obtained from the firm of petitioner Hathaway. The invoices from Hathaway's firm were completed by Graham to state that Hathaway had provided services and equipment to Meridian, although no such services were rendered by Hathaway. Graham would then authorize payments from Meridian in accordance with the fraudulent invoices, resulting in payments to Hathaway and, through him, to Baptista. Baptista suggested this procedure at the meeting and provided Graham with blank invoices to use in making the payments (I Tr. 50-54).

The $25,000 payment was subsequently made in a series of four corporate checks payable to Hathaway and mailed by Meridian from its office in Pennsylvania to

Hathaway in Massachusetts. The first check was mailed in July 1971, and Baptista subsequently informed Graham that the procedure was satisfactory and that the first check had been received (I Tr. 63-70, 92-93; III Tr. 129-130).

In August 1972, Graham and Baptista made a similar arrangement involving a smaller construction contract with the Authority (I Tr. 108-109; V Tr. 98-102). For this contract, a $5,000 kickback to Baptista was agreed upon, and Baptista again provided Graham with blank invoices from Hathaway's firm with which to disguise the payment (I Tr. 113-114; V Tr. 98-102). Once again, Graham believed that the contract would not be awarded to Meridian if he did not agree to make the $5,000 payment to Baptista (V Tr. 101-102). This payment was subsequently made in the same manner as the initial $25,000, with Meridian mailing to Hathaway four corporate checks prepared in accordance with the fraudulent invoices prepared by Graham (III Tr. 107-108).

All the checks sent to Hathaway by Meridian were cashed at the Southeastern Bank in New Bedford, Massachusetts, and all were endorsed only in the name of the payee, Stephen Hathaway. Hathaway, who did not have an account at that bank, was approved for large check cashing privileges there by Baptista, an officer of the bank, who introduced Hathaway to the bank manager (V Tr. 69-71).

Hathaway cashed a number of checks at that bank, varying in amount between $200 and $20,000 (III Tr. 184-185, 193-194). Normally, Baptista's secretary telephoned ahead to the bank so that the cash would be ready when Hathaway arrived at the bank (III Tr. 193-194).

The head teller at the bank cashed a number of checks for Hathaway, including two checks from Meridian

(IV Tr. 13-27). On one of these occasions the head teller observed Hathaway talking to Baptista in the bank (V Tr. 62-65).

ARGUMENT

1. Petitioner Hathaway contends (Pet. 10-18) that the evidence was insufficient to support his conspiracy convictions because there was no direct evidence of an agreement between himself and Baptista. The agreement which is the essential element of a conspiracy, however, need not be established by direct evidence, or be shown to have been explicit, but can be inferred from the facts and circumstances of the case. *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10; *United States* v. *Miller*, 508 F. 2d 444 (C.A. 7); *United States* v. *Flaxman*, 495 F. 2d 344 (C.A. 7), certiorari denied, 419 U.S. 1031.

There was ample circumstantial evidence of an agreement in this case. Not only did Baptista provide Graham with Hathaway's invoices and direct that payment be made in that manner, but he aided Hathaway in cashing the checks at his bank. Hathaway cashed checks mailed to him by Meridian,[1] and Baptista told Graham that the procedure was satisfactory and that the first payment in connection with the $25,000 kickback had been received. As the court of appeals properly concluded (Pet. App. 25-26),[2] the evidence, when viewed in the light most favorable to the government, provided sufficient support

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[1]Contrary to petitioner Hathaway's suggestion (Pet. 17), a bank teller did identify him as the individual who cashed several Meridian checks (IV Tr. 13-27).

[2]Hereinafter "Pet. App." refers to the appendix to the petition in No. 75-1528.

for the jury's finding that Hathaway was participating in the scheme as a conduit for the transmission of the illegal proceeds to Baptista. See *Glasser* v. *United States*, 315 U.S. 60, 80.[3]

2. Petitioners assert (No. 75-1528 Pet. 16-18; No. 75-1529 Pet. 23-25) that the trial court erred in instructing the jury that they could be convicted under the Travel Act, 18 U.S.C. 1952, upon proof of voluntary payment of bribes. Petitioners do not challenge the instruction in and of itself. Rather, they argue that, since the Hobbs Act counts of the indictment required proof of "extortion," the jury instruction under the Travel Act was improper because it allowed the government "to proceed on inconsistent theories" of proof.

The Travel Act, unlike the Hobbs Act, punishes bribery (as well as extortion) that is "in violation of the laws of the State in which committed." 18 U.S.C. 1952(b)(2). In charging the jury on the Travel Act counts, the district court stated that a Massachusetts statute (Mass. Gen. Laws, c. 268A, §2(b) (1964)),[4] was the applicable state law,

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[3]The cases cited by petitioner Hathaway (Pet. 11-18) do not conflict with the holding of the court below. Rather these cases involve only the question whether the evidence in each particular case, when assessed under settled principles of law, constituted sufficient evidence of a conspiracy.

[4]This statute is directed in part against:

> Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for
>
> (1) being influenced in his performance of any official act or any act within his official responsibility * * *

and distinguished between the elements of extortion under the Hobbs Act, and the crime defined by the Massachusetts statute, which does not require a finding of extortion. The district court instructed (see Pet. App. 21):

> It is not necessary to show that there was any duress or compulsion with respect to the agreement to pay or the actual payment in that case. Of course if the transaction between Graham and Baptista does not rise above a voluntary payment upon the part of Graham, the defendants cannot be found guilty on Counts 3 or 5 [the Hobbs Act counts]. They can be found guilty upon Counts 4 and 6 [the Travel Act counts] insofar as the unlawful activity is concerned, namely the question of, to describe it briefly, the kickback, if you find that that has been proved to your satisfaction beyond a reasonable doubt.

As the court of appeals correctly held, this instruction did not prejudice petitioners (Pet. App. 21); the offenses of bribery and extortion, as those terms are defined by the state statute and the Hobbs Act, respectively, are not mutually exclusive:

> Conviction based on findings both of extortion and a violation of the Massachusetts statute would be perfectly consistent. It is true that one not guilty of extortion might still violate the [state] statute. But the court took care of this possibility by explaining to the jury that if no more than a voluntary payment by Graham was found, there could be no Hobbs Act

conviction. There was no prejudice in the submission, under the Travel Act, of the broader theory.[5]

3. Petitioners assert (No. 75-1528 Pet. 11-16; No. 75-1529 Pet. 25-31) that the trial court also erred in instructing the jury that the interstate travel element of the Travel Act need not be established by showing the use of interstate facilities by petitioners themselves, but would be satisfied if petitioners "caused or induced" Graham to travel interstate or to use the mail.

The court's instruction correctly stated the applicable law. The Travel Act makes it unlawful to use any facility in interstate commerce, including the mail, to distribute the proceeds of any unlawful activity or otherwise to facilitate the carrying on of any unlawful activity; in turn, 18 U.S.C. 2 provides that whoever induces the commission of an offense is punishable as a principal. Accordingly, the Travel Act may be violated where the interstate travel or the use of the interstate facility is by the individual who has acceded to the bribery demands of the defendant, providing the defendant caused the

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[5]Indeed, the instruction may have been more favorable to petitioners than that to which they were entitled under the Hobbs Act. The definition of "extortion" under the Hobbs Act includes the act of obtaining property from another, with the consent for the payment having been "induced * * * under color of official right." 18 U.S.C. 1951(b)(2). Since inducement under the color of official right need not involve coercion, payments "extorted" by a public official through the wrongful use of his office may be "voluntarily" made in the sense that the initiative for the payment may come from the payor. See Pet. App. 11; *United States* v. *Trotta*, 525 F. 2d 1096 (C.A. 2), certiorari denied, May 19, 1976 (No. 75-1032); *United States* v. *Mazzei*, 521 F. 2d 639, 644-645 (C.A. 3), certiorari denied, 423 U.S. 1014; *United States* v. *Braasch*, 505 F. 2d 139 (C.A. 7), certiorari denied, 421 U.S. 910. But, in any event, petitioners' contention that the court's instruction allowed the government to proceed on inconsistent theories is incorrect.

travel or usage. See *United States* v. *DeCavalcante*, 440 F. 2d 1264, 1268 (C.A. 3); *United States* v. *Marquez*, 449 F. 2d 89 (C.A. 2), certiorari denied, 405 U.S. 963. *Rewis* v. *United States*, 401 U.S. 808, is not to the contrary. In *Rewis* this Court held that Congress did not intend the Travel Act to apply to criminal activity solely because that activity is at times patronized by persons of another State. 401 U.S. at 811-812; but see 401 U.S. at 813-814. But the interstate nexus here involves much more than travel by one for the purpose of patronage. The mailing of the checks by Meridian from its principal office in Pennsylvania to Hathaway in Massachusetts constituted the very essence of the scheme. These mailings were caused by petitioners, who arranged the method of payment. As the court of appeals correctly pointed out (Pet. App. 19-20):

> [E]vidence of Meridian's prearranged use of the mails to forward checks to defendants strongly supported a jury finding of a requisite interstate activity. When Baptista gave Graham the blank invoices for the purpose of making payments, he knew that Meridian was a Pennsylvania-based company and that the addresses on the invoices were in Massachusetts. This use of the mails was more than "incidental", *United States* v. *Isaacs*, 493 F. 2d 1124, 1146-49 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), for it was an important link in the interchange between defendants and Meridian. *Cf. United States* v. *Hedge*, 462 F. 2d 220, 223-24 (5th Cir. 1972). While the Travel Act is to be construed narrowly, see *Rewis* v. *United States*, this conduct falls squarely within the language of 18 U.S.C. §1952. *See United States* v. *Archer*, 486 F. 2d 670 (2d Cir. 1973).

4. Petitioners also contend (No. 75-1528 Pet. 18-22; No. 75-1529 Pet. 18-23) that they were denied due process on the ground that the grant of immunity to four

prosecution witnesses did not comply with the requirements of 18 U.S.C. 6003. But the procedure followed in the issuance of the immunity orders in this case fully complied with the requirements of that statute. The orders were properly issued upon the request of the United States Attorney following the approval of the designated Assistant Attorney General.

In any event, a challenge to the validity of a grant of immunity, like the assertion of the privilege against self-incrimination, is personal to the witness, and petitioners have no standing to contest the legal sufficiency of the immunity orders issued in this case. See *United States* v. *Braasch, supra,* 505 F. 2d at 146-147; *United States* v. *Lewis,* 456 F. 2d 404 (C.A. 3); *Lopez* v. *Burke,* 413 F. 2d 992 (C.A. 7); *Bowman* v. *United States,* 350 F. 2d 913, 915-916 (C.A. 9).

5. Petitioners also argue (No. 75-1528 Pet. 18-19; No. 75-1529 Pet. 18-19) that they were denied due process by the action of the trial court permitting the four witnesses to testify despite the failure of the government to comply fully with a pretrial discovery order requiring disclosure of any promises that had been made to encourage testimony of government witnesses.

While the actual immunity orders were not issued until the second day of trial, the government allegedly violated the district court's discovery order by failing to reveal prior to trial the existence of a letter to the witnesses' attorney stating that the government intended not to prosecute these individuals (II Tr. 23-29). But petitioners were aware both of the letter and of the immunity orders before any of these witnesses testified, and petitioners were therefore able effectively to exercise their right to cross-examine the witnesses in this regard (II Tr. 45, 69, 122; III Tr. 67). Under these circumstances, petitioners

are unable to show prejudice, and the courts below were therefore correct to dismiss petitioners' contention. As the court of appeals held (Pet. App. 28), "[t]he [district] court has discretion in the handling of alleged non-compliance with discovery orders, Fed. R. Crim. P. 16(d)(2), and we find no such evidence of deliberate Government misconduct or prejudice as to require a different disposition from that adopted by the [district] court."

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1976.

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